



## King's Research Portal

DOI:

[10.1093/yel/yey009](https://doi.org/10.1093/yel/yey009)

*Document Version*

Peer reviewed version

[Link to publication record in King's Research Portal](#)

*Citation for published version (APA):*

Stefan, O. A., & Petri, M. (2018). Too Weak to Be Controlled: Judicial Review of ACER Soft Law. *Yearbook of European Law*, 37, 525-550. <https://doi.org/10.1093/yel/yey009>

### **Citing this paper**

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

### **General rights**

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

### **Take down policy**

If you believe that this document breaches copyright please contact [librarypure@kcl.ac.uk](mailto:librarypure@kcl.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



## King's Research Portal

[Link to publication record in King's Research Portal](#)

*Citation for published version (APA):*

Stefan, O. A., & Petri, M. (Accepted/In press). Too Weak to Be Controlled: Judicial Review of ACER Soft Law.

### **Citing this paper**

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

### **General rights**

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

### **Take down policy**

If you believe that this document breaches copyright please contact [librarypure@kcl.ac.uk](mailto:librarypure@kcl.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.

# Too Weak to Be Controlled: Judicial Review of ACER Soft Law

Oana Stefan, King's College London  
Marina Petri, Bocconi University, Milan

## 1 Introduction<sup>1</sup>

Energy is an area of shared competences between the EU and its Member States. With Member States retaining large powers, regulation was, for a long time, left to informal networks of stakeholders who played a key role in coordinating policies. Following the introduction of Art 194 TFEU in the Lisbon Treaty, the third energy package builds on these informal arrangements and delegates regulatory and enforcement powers to public national regulators and to private transmission system operators (TSOs). These are organized in networks coordinated by the Agency for the Cooperation of Energy Regulators (ACER). ACER carries out tasks meant essentially to enhance cooperation between the different public and private players, while also having a monitoring function, and decision-making power in technical areas.

Given the complexities of regulation briefly hinted to above, energy has been an excellent terrain for the development of various non-legally binding tools – or soft law. The literature has already shown the many ways in which soft law has been prominent in the energy sector,<sup>2</sup> and has taken a stance against such instruments, arguably enacted ‘outside the legislative arena of democratic politics.’<sup>3</sup> This paper is concerned more specifically with soft law issued by ACER, which is a good case study for an underlying tension regarding the *Meroni* doctrine. According to a strict application of this doctrine, ACER has been delegated very limited decision-making powers, but issues a wide variety of soft law instruments, mostly in technical areas. However, under the guise of their ‘technical’ nature, some of these instruments can contain normative rules. This is especially problematic given that soft law has an unclear legal status and, as a consequence, ACER often escapes judicial oversight, potentially undermining accountability and the balance of powers. The analysis is placed in the wider context of the debates concerning the Energy Union, and the institutional developments introduced in the

---

<sup>1</sup> This article is based on the research of Oana Stefan. Marina Petri primarily contributed to the writing of Part 2, she assisted with parts of the research, and the article was jointly edited. Many thanks for useful comments the participants to the workshop *Soft Law Before the European Courts: Discovering a Common Pattern?* 19-20 November 2015, Brussels, to the participants to the Energy panel of the 2017 SLS Conference, UCD Dublin, to Mariolina Eliantonio, Emilia Korkea-aho, and the anonymous reviewers for their comments on earlier drafts.

<sup>2</sup> B Eberlein, ‘Regulation by Cooperation: The “Third Way” in Making Rules for the Internal Energy Market’, in P Cameron (ed), *Legal Aspects of EU Energy Regulation* (Oxford: Oxford University Press, 2005) 59.

<sup>3</sup> B Eberlein, ‘The Making of the European Energy Market: The Interplay of Governance and Government’ (2008) 28 *Journal of Public Policy* 73.

recent Winter Package.<sup>4</sup> The paper will offer an overview on delegation in the energy sector and discuss the role of ACER before delving into the analysis of specific soft law instruments developed by the Agency and their justiciability.

## 2 Energy: sharing of competences and the role of ACER

Regulation in the energy sector should focus, in principle, on the so-called energy triangle:<sup>5</sup> harmoniously combining security of supply, competition, and environmental protection. Competence is shared between the EU and the Member States,<sup>6</sup> while Member States retain the right to determine the conditions for the exploitation of energy resources, as well as the choice between those resources and the general structure of energy supply.<sup>7</sup> In addition, the Union contributes to the development of trans-European networks in the area of energy infrastructures.<sup>8</sup> Regard needs to be had to legal principles, notably the principles of subsidiarity and proportionality,<sup>9</sup> with the current regulatory framework leaving a lot of discretion to the Member States.<sup>10</sup>

However, it is not entirely clear how the competences are shared between the EU and the Member States<sup>11</sup> in this sector situated at the intersection between various policies such as competition, state aid, environment, security and international relations. As in all sensitive sectors, the strategy of the European Commission has been to counter the failure to harmonize and the ensuing regulatory gap through promoting informal harmonization by transnational regulatory networks.<sup>12</sup> The creation of national regulatory authorities in energy was pushed through three liberalization packages, and, by 2005, there was at least one NRA in each Member State.<sup>13</sup> The tasks entrusted to them included monitoring rules on interconnection and unbundling, and network access; approving terms and conditions (including tariffs) for new producers, and the conditions for connection and access to the network. The Third energy package<sup>14</sup> also provided for reinforced cooperation between the

---

<sup>4</sup> Winter Package 'Clean Energy for All Europeans – unlocking Europe's growth potential' available at <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition> (the Winter Package).

<sup>5</sup> According to the policy developments enshrined in the European energy strategy and Energy Union. See, *ex multis*, Communication from the Commission "Clean Energy For All Europeans", COM(2016) 860 final, 30<sup>th</sup> November 2016.

<sup>6</sup> Article 4(2)(i) TEU.

<sup>7</sup> Article 194 TFEU.

<sup>8</sup> Article 170 TFEU

<sup>9</sup> Article 5(3) TEU and Article 5(4) TEU respectively.

<sup>10</sup> K Talus, *EU Energy Law and Policy A Critical Account* (Oxford: Oxford University Press, 2013) 109.

<sup>11</sup> E Thompson, 'The European Union's Energy Policy: Two Track Development' in N Witzleb, AM Arranz and P Winand (eds), *The European Union and Global Engagement: Institutions, Policies and Challenges* (Cheltenham: Edward Elgar Publishing, 2015) 178.

<sup>12</sup> B Eberlein and E Grande, 'Beyond delegation: transnational regulatory regimes and the eu regulatory state' (2005) 12 *JEPP* 89, 100.

<sup>13</sup> C W Jones and W Webster, *EU Energy Law, The Internal Energy Market* 3rd edn (Leuven: Claeys & Casteels, 2010) 111-112.

<sup>14</sup> The Third energy package comprises the following legislative interventions: Directive 2009/72/EC (hereinafter: the "Electricity Directive"), OJ L 211, 14.8.2009, 55–93; Directive 2009/73/EC (hereinafter: the "Gas Directive") OJ L 211, 14.8.2009, 94–136; Regulation (EC) 713/2009 (hereinafter: the "Agency Regulation") OJ L 26, 21.5.2009, 13–22, Regulation (EC) 714/2009 (hereinafter: the "Electricity Regulation"), OJ L 211, 14.8.2009, 15–35, and Regulation (EC) 715/2009 (the "Gas Regulation") OJ L 211, 14.8.2009, 36–54. Moreover, additional

transmission system operators, through the creation of European networks of transmission system operators for gas (ENTSOg) and electricity (ENTSOe).

The initial voluntary cooperation between national regulators has been relatively formalized, over the years, culminating with the creation of ACER in 2011.<sup>15</sup> ACER fulfills several roles. It provides a platform for cooperation for NRAs and TSOs, which, as expressly articulated under the legislation, should lead to the creation of a common regulatory regime to deal with cross border issues.<sup>16</sup> To fulfill this cooperative rule, ACER has the power to make non-binding recommendations. ACER monitors the work of the NRAs and the TSOs but it cannot veto actions by these entities given the strict and careful application of the *Meroni* doctrine.<sup>17</sup> ACER has been given decisional powers only on technical issues<sup>18</sup> and on a case by case basis, all under the control of the European Commission. In this connection, one should note that the line between what is technical and what is normative is fairly thin, as technical standards could contain rules of conduct. ACER advises the NRAs in its areas of competence and can make recommendations to help share good practices. The NRAs report annually to ACER on their activities and ACER can provide assistance if an NRA has difficulties in applying the guidelines.<sup>19</sup> This can take the form of legal economic and technical assistance in relation to energy regulation.<sup>20</sup> Furthermore, ACER might be requested to deliver opinions on the compliance of decisions taken by the NRAs with the energy regulatory framework. Under the REMIT Regulation (which deals with monitoring market integrity and transparency, in order to detect eventual market manipulation), ACER is responsible with gathering and centralizing information, while enforcement powers rest with the NRAs<sup>21</sup>.

Given the fuzzy boundaries of shared competences and the inherent tensions between the aims of the policy, regulation has developed, in energy, as a result of the relationship between ACER, the Commission, and the National Regulatory Authorities (NRAs)<sup>22</sup>, with TSOs playing

---

normative texts included in the mentioned process are: Regulation (EU) 1227/2011 (hereinafter: “REMIT Regulation”), OJ L 326, 8.12.2011, 1–16, Regulation (EU) 994/2010 (hereinafter: “the Regulation on security of gas supply”, which ceased its validity on 31<sup>st</sup> October 2017), OJ L 295, 12.11.2010, 1–22, Regulation (EU) 838/2010 (hereinafter: the “ITC Regulation”), OJ L 250, 24.9.2010, 5–11, and Regulation (EU) 347/2013 (hereinafter: “the TEN-E Regulation”), OJ L 115, 25.4.2013, 39–75.

<sup>15</sup> Commission Decision of 16<sup>th</sup> May 2011 (OJ C 146, 17.5.2011, 3–4), repealing Decision 2003/796/EC of 11<sup>th</sup> November 2003 (OJ L 296, 14.11.2003, 34–35).

<sup>16</sup> Article 38 of the Electricity Directive, Article 42 of the Gas Directive.

<sup>17</sup> S Lavrijssen, and L Hancher, *European Regulators in the Network Sectors: Revolution or Evolution?* (June 2008), TILEC Discussion Paper No. 2008-024, available at SSRN: <http://ssrn.com/abstract=1162164> or <http://dx.doi.org/10.2139/ssrn.1162164>, 6 (last checked: 23<sup>rd</sup> February 2018).

<sup>18</sup> For example, these include network codes, certification of TSOs, provision of information, rules for the trading of electricity and rules on investment incentives for the construction of inter-connector capacity under the Third Package, as well as decisions on investment requests, including cross-border cost allocation under the TEN-E Regulation.

<sup>19</sup> Articles 7(4) and 7(6) of the Agency Regulation.

<sup>20</sup> See for example the tender for assistance to Ljubljana, available at the following link (last checked: 26<sup>th</sup> February 2018): [https://www.acer.europa.eu/en/The\\_agency/Public\\_Procurement/Documents/ACER%20OP%20DIR%2008%202013%20LOT%203%20Contract%20Award%20Notice.pdf](https://www.acer.europa.eu/en/The_agency/Public_Procurement/Documents/ACER%20OP%20DIR%2008%202013%20LOT%203%20Contract%20Award%20Notice.pdf).

<sup>21</sup> See Recital 15 and Article 1 of the REMIT Regulation.

<sup>22</sup> In S Lavrijssen and I Bordel, ‘ACER: demystifying the European energy regulator from a consumer perspective’ (2012) 10(5) *Oil, Gas and Energy Law Intelligence* 6, the concept of “triangular relationship” is used to emphasise the controversial relationship between the EU energy actors in enforcing the conflicting consumer interests in

an important role. Consequently, ACER is an atypical actor within the EU network agency landscape. Defined a “highly advanced example of European composite administration”<sup>23</sup>, the Agency combines, both according to the relevant provisions of the Agency Regulation and with reference to its internal practice, a variegated approach in terms of NRAs involvement in the decision-making process. Its organisation neither follows the traditional EU agency template,<sup>24</sup> nor the models adopted in other contexts that share similar economic characteristics to the energy sector, such as telecommunications. While ACER has been tagged as a network agency, given that it gathers representatives of national regulatory agencies in its Board of Regulators,<sup>25</sup> it has a dual nature, both European and national. ACER’s internal governance mechanisms reflect this dual nature, and ACER’s Board of Regulators has both a propulsive and a supervisory role with regards to the Director and the Administrative Board. In practice, it is often the Director, and not the Board of Regulators who formulates concrete proposals. The Board of Regulators mainly operates as a body which only approves the proposals of the Director or vetoes them. Given these distinctive features, ACER is an interesting case study with regards to EU agency decision making. However, these peculiarities also suggest that conclusions of a case study on ACER cannot be extended to other EU agencies without further research.

Following the *Meroni* doctrine, the delegation of powers in the European Union should follow a set of rules, namely an authority cannot delegate powers that it does not have; delegated powers should be expressly stated; delegation needs to be necessary; finally, the exercise of delegated powers should be subject to review, and the delegation of discretionary powers is prohibited.<sup>26</sup> *Short Selling*<sup>27</sup> clarifies that the delegation doctrine applies to agencies and indicates a certain relaxation of the above rules, especially in relation to financial sector. In the case of ACER, research shows that the (original) *Meroni* doctrine has played an important role in confining ACER’s competences, against the Commission’s initial proposal,<sup>28</sup> to supporting and to coordinating the NRAs in performing their functions at the EU level. Thus, ACER carries out some complementary regulatory tasks alongside national authorities. The Agency relies on soft law and the *voluntary* cooperation of NRAs, while its binding decision-making power depends largely on the request of national regulators or their failure to take a decision within a certain time frame. The Commission voiced concerns as to the lack of powers of ACER to enable it to effectively contribute to EU energy market integration and the Energy

---

this sector. Notably, the idea of “triangular relationship” is borrowed from P Larouche and M de Visser, ‘The triangular relationship between the Commission, NRAs and National Courts revisited’ (2006) 64 *TILEC discussion paper, Communications and Strategies* 125- 145.

<sup>23</sup> J Schneider, ‘Energy and trans-European Networks’, in H C Hoffman, G C Rowe and A H Türk (eds.), *Administrative law and policy of the European Union* (Oxford, Oxford University Press, 2015) 354.

<sup>24</sup> Common Approach on EU decentralised agencies, July 2012, available at [https://europa.eu/european-union/sites/europaeu/files/docs/body/joint\\_statement\\_and\\_common\\_approach\\_2012\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf). (last checked: 26<sup>th</sup> February 2018).

<sup>25</sup> S Lavrijssen and L Hancher, ‘Networks on Track: From European Regulatory Networks to European Regulatory ‘Network Agencies’’ (2009) 36 *Legal Issues of Economic Integration* 23.

<sup>26</sup> Case C - 10/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] EU:C:1958:7.

<sup>27</sup> Case C - 270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] EU:C:2014:18.

<sup>28</sup> F Ermacora, ‘The Agency for the Cooperation of Energy Regulators (ACER)’, in C W Jones and W Webster, *EU Energy Law, The Internal Energy Market* 3rd edn (Leuven: Claeys & Casteels, 2010).

Union.<sup>29</sup> Recently, the Commission proposed new reforms to the energy sector through a ‘Winter Package’. The powers of ACER are increased only to a limited extent, due mainly to staffing and budgetary concerns, as well as a danger to concentrate expertise within the Agency.<sup>30</sup> Accordingly, soft law is likely to remain the Agency’s core regulatory tool. Indeed, while ‘hardening’ the nature of the legal instruments issued by ACER could strengthen its role as a center of policy making and also enhance the potential for judicial review, the Agency structurally lacks the political and institutional legitimacy to act as a supranational regulator. Moreover, the shaky legal basis of such a shift, as well as the difficult balance of shared competences between the Union and the Member States are strong arguments against a significant upgrade of ACER’s powers.<sup>31</sup>

### 3 Soft law in energy regulation

Studying EU energy soft law is important from several points of view. First, the centrality of energy infrastructure in the expansion of the European project needs to be acknowledged, as well as the specificity of the sector. The regulatory structure and evolution of the energy market design presents some relevant discrepancies with regards to other regulated markets that share a comparable economic and technological structure, such as telecoms<sup>32</sup>. Second, EU energy law provides a unique perspective over the evolution of multilevel governance in Europe, as the creation of an internal energy market required policy makers to balance competition and coordination of the players involved.<sup>33</sup> Soft law is key to this balancing exercise, as it integrates traditional law making with the flexibility required by the context. Third, EU energy soft law plays a paramount role in accommodating structural divergences between regulatory cultures<sup>34</sup> at the national and the European level. More precisely, soft law helps bridging the regulatory gap between national administrations, as its implementation often requires a homogeneous engagement effort at national level. Soft law thus becomes a valuable liberalisation and integration instrument with regards to cross-border issues. Fourth, the trilateral relationship between ACER, the Commission, and the NRAs represents an intrinsic characteristic of the energy sector, where the shift of regulatory powers to the

---

<sup>29</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee, the Committee of the Regions and the European Investment Bank A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 80 final, 9.

<sup>30</sup> Proposal for a Regulation of the European Parliament and the Council on the Governance of the Energy Union (hereinafter: “Proposal for a Governance Regulation”), amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EU and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, COM/2016/0759 final/2 - 2016/0375 (COD). See in particular the Explanatory Memorandum, 2 - 11.

<sup>31</sup> “Proposal for a Governance Regulation”, Explanatory Memorandum, 2 - 11.

<sup>32</sup> D Levi-Faur, ‘The Governance of competition: the interplay of technology, economics, and politics in European Union electricity and telecom regimes’ (1999) 19 *Journal of public policy* 175-207.

<sup>33</sup> E Brousseau and J Glachant, ‘Regulators as reflective governance platforms’ (2011) 12(3) *Competition and Regulation in Network Industries* 195.

<sup>34</sup> E Bohne, ‘Conflicts between national regulatory cultures and EU energy regulations’ (2011) 19 *Utilities Policy* 255-269.



supranational institutions has led to a substantial increase in the competences of NRAs, in terms of implementation and single case decision-making.

The Commission issues a wide range of soft law that affect the regulation of the energy market, both in the form of sector-specific interpretative texts and through distinctive pieces of legislation that have a hybrid nature. One example of interpretative guidelines is the 2014 State aid Guidelines on Energy and the Environment,<sup>35</sup> an instrument tackling energy from a competition policy (State aid) perspective. This is an Art 288 TFEU instrument that, according to established case law,<sup>36</sup> should be binding on the discretion of the Commission. The Court will engage in judicial review if such effects are proven, which entails a number of difficulties. As discussed elsewhere,<sup>37</sup> justiciability depends on who brings a case and from what level of European governance. For instance, the Court has not acknowledged binding effects of Commission State aid guidance for national authorities, even though it admitted in the same case the relevance of the guidance in assessing compliance of national measures with European law.<sup>38</sup> The uncertain legal effects of Commission soft law and its limited justiciability would raise similar problems in energy as in other areas, as discussed in other articles of this special issue. While acknowledging these matters, the current article focuses on the soft law issued by ACER, given that such instruments are the main tools available to the Agency when discharging its duties.

A case study of ACER soft law would advance knowledge on the role that soft law plays in European energy governance, and the accountability problems the recourse to such instruments might entail. The predominantly 'soft' powers of the Agency are connected to a strict interpretation of the *Meroni* doctrine. Yet, if one is to take the doctrine seriously (as also developed in *Short Selling*), an important component thereof concerns accountability, institutional balance, and, more specifically, judicial review. Or, with ACER operating, through soft powers, a delicate balance between its interlocutors, be them public (such as the Commission and the NRAs) or private (such as the transmission system operators), one may wonder to whom is ACER accountable, who is accountable to ACER and for what.<sup>39</sup> The Agency Regulation contains some limited mechanisms<sup>40</sup> for ensuring accountability towards the EU

---

<sup>35</sup> Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, 1–55.

<sup>36</sup> Case C-311/94 *IJssel-Vliet v. Minister van Economische Zaken* [1996] EU:C:1996:383, and Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] EU:C:2005:408.

<sup>37</sup> O Stefan 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21(2) *Maastricht Journal of European and Comparative Law* 359-379.

<sup>38</sup> Case C - 526/14, *Tadej Kotnik and Others v Državni zbor Republike Slovenije* [2016] EU:C:2016:570.

<sup>39</sup> Accountability difficulties are common to network agencies – see S Lavrijssen and L Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory 'Network Agencies'' (2009) 36 *Legal Issues of Economic Integration* 23.

<sup>40</sup> According to the Regulation, several layers of accountability are defined with regards to ACER. The Agency is accountable both on budgetary and financial matters (Art. 24). The European Ombudsman may also be involved in compliant proceedings in front of the Court of Justice, and it thus plays a supervisory role (Art. 30). More importantly, the Regulation spells out a series of reporting obligations, both in terms of independent evaluation and in terms of regulatory reporting activities. For its monitoring role in relation to the ENTSOs and the NRAs, ACER is accountable to the Commission. Moreover, the Director and the Chairman of the Board of Regulators are periodically heard by the European Parliament (more on this on ACER "towards an internal energy market for the benefit of all EU consumers", communication strategy 2014-2015). This multifaceted set of mechanisms,



Parliament, the Council and the Commission,<sup>41</sup> and it sets out the roles of the boards where the interests of the Union and of its MS (Administrative Board) and of the regulator (Board of Regulators) are represented<sup>42</sup>. However, partially due to the increasingly technical nature of the regulated matters, the Board of Regulators is less and less involved in the proposal and adoption of regulatory outputs, increasing the accountability gap. The Agency Regulation provides also for the creation of an internal Board of Appeal, comprising six members and six alternates selected from among current or former senior staff of the NRAs, NCAs, or other national or Union institutions with relevant experience in the energy sector. While there is some provision for a member not to sit where there is a conflict of interest, the Board of Appeal is not a judicial body in terms of membership although it carries out a judicial role. It provides an evaluation by peers whose decisions can then be challenged before the EU Court of Justice. Nevertheless, as analyzed in Section 4.3.1 below, the Board of Appeal does not review acts of non-legally binding nature issued by the Agency.

In this context of fuzzy accountability, the present paper focuses on the lack of judicial review of soft law issued by ACER. As developed in *Romano*,<sup>43</sup> judicial review of delegated powers is an important component of the *Meroni* doctrine, with the Court reinstating this point also in *Short Selling*.<sup>44</sup> The fact that ACER issues mostly instruments deprived of legally binding force means that judicial oversight is inexistent. Herein lies the conundrum that this paper is set to unveil. Hardening ACER's decision-making powers would inevitable sit uneasily with the *Meroni* doctrine, and the tenet that only non-discretionary powers can be delegated. However, confining ACER's powers means that the soft law instruments issued by the Agency might not be justiciable, hence undermining another tenet of the doctrine, which is accountability – and more generally the balance of powers.<sup>45</sup> While judicial review is not a panacea for modern ills of regulation, the analysis below will show that there exists, currently, a mismatch between the potentially wide practical effects of the instruments issued by ACER and the very limited avenues for redress against such instruments. In this regard, ACER soft law is no different from other instruments analysed by this special issue – or indeed the literature on soft law of other European agencies.<sup>46</sup>

---

however structurally articulated, does not provide a satisfactory answer to the “accountability dilemma” with regards to ACER. Arguably, the mentioned move from ERGEG to ACER has not represented a significant step forward in terms of accountability, as the *ex post* tools enshrined in the Regulation do not provide for an adequate level of protection to the actors involved, and they are not specific enough in nature. More substantially, the pervasive effects of the acts issued by ACER need to be counterbalanced by a structural and systematic review process, rather than merely being included in extensive reports to be presented to Parliament.

<sup>41</sup> Agency Regulation, Recital 24: “the Agency should be accountable to the European Parliament, the Council and the Commission, where appropriate”.

<sup>42</sup> Articles 3, 12 and 14 of the Agency Regulation.

<sup>43</sup> Case C - 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité* [1981], EU:C:1981:104.

<sup>44</sup> Case C - 270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] EU:C:2014:18, 46 – 53.

<sup>45</sup> For a detailed analysis of the balance of powers in the adoption of electricity network codes see S. Lavrijssen and T. Kohlbacher, *EU Electricity Network Codes: Good Governance in a Network of Networks* (January 8, 2018). TILEC Discussion Paper No. 2018-001. Available at SSRN: <https://ssrn.com/abstract=3098081> or <http://dx.doi.org/10.2139/ssrn.3098081>, accessed 12/07/2018

<sup>46</sup> See, *inter alia*, M van Rijsbergen, ‘On the Enforceability of EU Agencies’ Soft Law at the National Level: The Case of the European Securities and Markets Authority’ (2014) 10(5) *Utrecht Law Review* 116 – 131; E Chiti,

## 4 Justiciability of ACER Soft Law Instruments

### 4.1 Setting the scene

The Lisbon Treaty modified the list of acts that can be reviewed in Court to include also EU agencies (Article 263 (1) TFEU). Therefore, from the point of view of authorship at least, judicial review of instruments issued by ACER is possible. Of course, instruments issued by the networks of transmission system operators are much more problematic in this regard, as the European networks of transmission system operators for gas (ENTSOg) and electricity (ENTSOe) cannot be considered EU bodies. From a justiciability point of view, the most important problem raised by acts issued by agencies such as ACER is the lack of legal effects – as interpreted by the case law of EU Courts.<sup>47</sup> In this regard, one can note a mismatch between the actual effects of such instruments and the readiness of the EU Court to acknowledge them.<sup>48</sup>

The range of effects entailed by soft law is wide. These can be of practical<sup>49</sup> or of legal nature,<sup>50</sup> but remain rather uncertain from the point of view of (traditional) law, absent the legally binding force of the instrument. Despite this lack of legally binding force, the effects of soft law sometimes appear binding, from a legal or even an extra-legal point of view. The problem is that many of the political, moral, or even social commitments might have important consequences, although they are considered extra-legal by the Courts and are not enforced as such. There are only few circumstances when EU Courts acknowledge the effects of soft law: if soft law introduces supplementary obligations not mentioned in hard law provisions; when soft law is issued by an institution as a means of structuring its discretion; finally when soft law becomes binding on MS as result of negotiations coupled with Treaty obligations.<sup>51</sup> Consequently it appears that ‘for the issue of justiciability, the distinction between soft and hard law remains a valid distinction, while for policy development, implementation and assessment, the boundaries between hard and soft are, indeed, more blurred’.<sup>52</sup>

The soft law issued by ACER makes no exception to this brief account: while extremely relevant from a practical perspective, it would most likely fail to pass the necessary legal effects threshold that would make it relevant for a Court of law. The following sections will analyse, from a point of view of justiciability, several soft law instruments issued by ACER: the framework guidelines that form the basis of network codes, the recommendations and

---

‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’ (2013) 19(1) *European Law Journal*, 93–110; M. Simoncini, ‘The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency’ (2015) 21 *European Public Law*, Issue 2, pp. 309–342.

<sup>47</sup> A Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar Publishing, 2009) 11.

<sup>48</sup> Based on O Stefan ‘Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance’ (2014) 21(2) *Maastricht Journal of European and Comparative Law* 359.

<sup>49</sup> ‘Formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved’ K Jacobsson, ‘Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy’ (2004) 14 *Journal of European Social Policy* 359.

<sup>50</sup> A comprehensive list can be found in F Snyder ‘The Use of Legal Acts in EC Agricultural Policy’ in G Winter (ed.) *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Baden-Baden: Nomos, 1996) 463.

<sup>51</sup> J Scott, ‘In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law’ (2011) 48 *Common Market Law Review* 329.

<sup>52</sup> C de la Porte and P Pochet, ‘Why and how (still) study the Open Method of Co-ordination (OMC)?’ (2012) 22 *Journal of European Social Policy* 339.

opinions addressed to NRAs and TSOs, as well as the guidance issued under the REMIT regulation. The analysis will inevitably be abstract at times, as there is little EU case law in this regard. The choice of instruments was dictated by the fact that they all have a legal basis within secondary legislation and fit the definition of soft law as ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects’ and also legal effects.<sup>53</sup> Besides the above, ACER issues a variety of other documents, such as monitoring reports, work programmes, or, in the case of REMIT, a ‘reporting user package’, staff letters, Q&A and FAQ, and a newsletter.<sup>54</sup> Leaving aside the debate with regards to the legal effects of these documents,<sup>55</sup> suffice is to note here that the variety of instruments is impressive, and an indication of the ‘dysfunctional differentiation’<sup>56</sup> of post-legislative guidance by EU agencies.

## 4.2 Framework guidelines which form the basis of Network Codes

Framework Guidelines and Network Codes are instruments that provide rules for cross-border exchanges of energy. The sectors in which these can be adopted are listed in Art 8 (6) of the Electricity and Gas Regulations and include among others network security and reliability, network connection, third-party access, capacity-allocation and congestion-management, transparency, balancing, etc. Following *Meroni*, ACER was not granted power to issue legally binding rules in the area of creation and implementation of network codes,<sup>57</sup> but a procedure is put in place whereby ACER, the transmission system operators, and the European Commission participate in the elaboration of these network codes, which, subsequently, can (but do not have to) be made binding through comitology. The procedure starts with ACER being consulted by the Commission on the annual priority list identifying the areas set out in Article 8.6 of the Electricity and Gas Regulations, including network security and reliability rules, network connection rules or third party access rules. According to Article 6 of the Electricity and Gas Regulation, ACER needs to submit to the Commission non-binding framework guidelines setting out clear objectives and principles for the development of network codes relating to the areas identified in the priority list. In order to draft these framework guidelines, ACER needs to consult the ENTSOs. If the Commission is not satisfied with the way in which the guideline contributes to non-discrimination, effective competition and the efficient functioning of the market, it can request ACER to review it. If ACER does not submit a revision, the Commission can elaborate the guideline in question.

Subsequently, network codes are elaborated under Article 6 of the Electricity and Gas Regulations by the ENTSOs, at the request of the Commission. The Agency issues an opinion on the network code, and may ask the ENTSO to amend and resubmit its code. When the Agency is satisfied that the code is in line with the guideline, the Agency shall submit the

---

<sup>53</sup> Snyder, F. 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques'. In *Implementing EC Law in the United Kingdom: Structures for Indirect Rule*, edited by T. Daintith. Chichester: John Wiley & Sons, 1995, 64.

<sup>54</sup> J. Godin, M. Polet, & A. Jamar De Bolsée, 'Implementing REMIT: What a Legal Analysis Tells about the (Regulatory) Role of ACER', [2018] *European Journal of Risk Regulation*, 9(2), 192, 201-202.

<sup>55</sup> See J. Godin *et al*, *ibid*, or C. Vlachou, *New Governance and Regulation in the Energy Sector: What does the Future Hold for EU Network Codes?* (2018) *European Journal of Risk Regulation*, 9(2), 268.

<sup>56</sup> S Vaughan, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015), *Cambridge Yearbook of European Legal Studies* 17, 66-91

<sup>57</sup> Some increased powers in this regard are provided for in the Winter Package.

network code to the Commission and may recommend that it be adopted within a reasonable time period. The Commission might ask ACER to prepare the network code itself if the ENTSO did not manage to develop a network code within the deadline. Failing this, the Commission might draft the code itself. Finally, the Commission is supposed to adopt the code through comitology.<sup>58</sup> If this happens, the code becomes binding, if not, it remains non-binding. Non-binding codes can be elaborated also by the ENTOS. These need to be submitted to ACER for an opinion.

In a recent review of the EU Electricity Network Codes, Lavrijssen and Kohlbacher noted that the whole process suffers from important drawbacks from the point of view of good governance principles and accountability.<sup>59</sup> For the purposes of this article, we are mostly interested in the triggering 'soft law' component of the procedure, namely the framework guidelines. They might be considered 'steering instruments'<sup>60</sup> or 'programming legislation'<sup>61</sup> according to certain classifications of soft law. These are legal and/or political instruments with the objective to steer or guide action in a legally non-binding way by laying down 'new rules independently of an existing legal framework, or [...] adopted in the context of such a framework, prior to, simultaneous with or subsequent to legislation,'<sup>62</sup> hence adding to existing acts. Even if these guidelines are not made binding at a later stage, they are of vital importance for the subsequent elaboration of network codes by the ENTSOs. In fact, ACER needs to evaluate the network codes elaborated by the operators in the light of the guidelines, as well as in light of principles revolving around effective competition, security of supply, and sustainability.<sup>63</sup> In turn, the network codes elaborated in accordance with the guidelines will take precedence over relevant national codes or international standards and regulations.

An analysis of the way in which the process is conducted shows the relevance of the framework guidelines in the drafting of the network codes. For instance, following a number of public consultations and amendments suggested by the European Commission, ACER adopted in March 2014 the Framework Guidelines on rules regarding harmonised transmission tariff structures for gas ('Tariff FG')<sup>64</sup>. On this basis, ENTSoG was asked to

---

<sup>58</sup> Regulatory procedure with scrutiny under Article 28(2) of the Gas Regulation and Article 23(2) of the Electricity Regulation.

<sup>59</sup> Lavrijssen and Kohlbacher, *supra* n 45.

<sup>60</sup> L Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004) 157.

<sup>61</sup> D Chalmers, G Davies and G Monti, *European Union Law Texts and Materials* (Cambridge: Cambridge University Press, 2006) 137-138.

<sup>62</sup> L Senden, *supra* n 60, 157.

<sup>63</sup> 'Maintaining security of supply, supporting the completion and functioning of the internal market in electricity and cross-border trade, including delivering benefits to the customers and facilitating the Union's targets for penetration of renewable generation' (Framework Guidelines on Capacity Allocation and Congestion Management for Electricity) or 'establishing objective, fair, transparent and non-discriminatory rules for balancing in a cost-reflective way, and for creating appropriate incentives for network users and transmission system operators' (Framework Guidelines on Electricity Balancing, FG-2012-E-009 18<sup>th</sup> September 2012, available on ACER's official website at [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Framework\\_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Electricity%20Balancing.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Electricity%20Balancing.pdf), last checked on 26<sup>th</sup> February 2018).

<sup>64</sup> Available on ACER's official website at <https://www.entsog.eu/public/uploads/files/publications/Tariffs/2013/FG%20on%20Harmonised%20Gas%20Transmission%20Tariff%20Structures.pdf>, last checked on 26<sup>th</sup> February 2018.

elaborate a Draft Network Code on this issue, finally submitted to ACER in December 2014<sup>65</sup>. The Agency commented extensively on the code, in relation to a series of ‘misalignments’ with the Framework Guidelines, and a revised version was adopted by ENTSOG in July 2015 addressing all those issues. The opinion of ACER did not deal only with discrepancies between the Tariff FG and the Code, but also with mismatch between the Code and general principles of law, such as transparency/confidentiality. For example, the opinion points out that the draft Network Code inserted an inappropriately broad disclaimer in its Article 24 (2) – “The confidentiality of commercially sensitive information shall be preserved”. The Agency considered that there are diverging views between the Tariff FG and the Draft Code on the definition of commercial sensitive information, and that the above disclaimer could have been used as a justification for stepping out of any one or more of the publication requirements.<sup>66</sup> ENTSOG complied with the opinion and removed the contested phrase from the final network code, to comply with the Tariff FG. Interestingly, following comitology, several provisions related to the confidentiality of commercially sensitive information were inserted in the final regulation,<sup>67</sup> especially in relation to implementation and monitoring of the Regulation by the TSOs, and periodic consultation requirements.

The example above shows that the framework guidelines are important in the adoption of network codes. ACER will not hesitate to amend the proposals coming from ENTSOGs. At the same time, the committee and the Commission can also have a last word on this, and the final regulation can ultimately reflect the position of the TSOs, and not that of ACER. Earlier research, based on documented agency practice, presumed that the Commission will generally follow ACER’s recommendation,<sup>68</sup> but recent examples such as the one mentioned above<sup>69</sup> show that the Commission is not hesitant to change the proposed code. It follows that some degree of accountability to the Commission does exist, in practice. Still, judicial oversight of ACER’s initial framework guidelines might be interesting as, for instance, one question might be whether the requirements of consultation have been properly carried out by ACER.<sup>70</sup> The broad competence of ACER to examine network codes in relationship to general principles of law might be contested by the ENTSO. Furthermore, one may even question the appropriateness of entrusting the drafting of legislation to commercial operators.

Such judicial review can occur following the adoption of the network codes. With regards to codes that become implementing regulations following comitology, judicial review of the guidelines on which they are based is possible, in light of *Artegodan*. In that case, the Court held that, even if an agency opinion has no binding effects, its unlawfulness must be regarded

---

<sup>65</sup> ‘Network Code on Harmonised Transmission Tariff Structures for Gas - ENTSOG Network Code for ACER Reasoned Opinion’, 26<sup>th</sup> December 2014, published on ENTSOG’s official website and available at [https://www.entsog.eu/public/uploads/files/publications/Tariffs/2014/TAR0450\\_141226\\_TAR%20NC\\_Final.pdf](https://www.entsog.eu/public/uploads/files/publications/Tariffs/2014/TAR0450_141226_TAR%20NC_Final.pdf), last checked on 25<sup>th</sup> February 2018.

<sup>66</sup> Opinion of The Agency for the Cooperation of Energy Regulators No 02/2015 of 26 March 2015 on the Network Code on Harmonised Transmission Tariff Structures For Gas, p. 4.

<sup>67</sup> Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (Text with EEA relevance) OJ L 72, 17.3.2017, 29–56

<sup>68</sup> S A C M Lavrijssen and I Bordei, ‘ACER: Demystifying the European Energy Supervisor from a Consumer Perspective’ (2012) 10(5) *Oil, Gas & Energy Law Journal* 12.

<sup>69</sup> For another example concerning the Gas Capacity Allocation Mechanism Network Code see M L P Groenleer, ‘Redundancy in Multilevel Energy Governance: Why (and When) Regulatory Overlap Can Be Valuable’ (2016), available at SSRN: <https://ssrn.com/abstract=2865683>. (last checked on 23<sup>rd</sup> February 2018).

<sup>70</sup> With regards to the importance of consultations in the drafting of network codes see C. Vlachou, *supra* n. 55.



as a breach of essential procedural requirements rendering a Commission decision based thereon unlawful.<sup>71</sup> Given their status as steering instruments, the framework guidelines issued by ACER are more than just scientific opinions: they contain rules of conduct, and hence, should, *a fortiori*, also be subject to judicial review. However, some of the network codes never become binding – failing approval by the Commission – or in the case the code is adopted by the ENTSO on their own motion. Such codes do not have legally binding force but might in fact regulate the networks and affect market participants and consumers. Their justiciability would be limited not only by the lack of legal effects but also given their authorship by private undertakings organized in a network. As detailed by Lavrijssen and Kohlbacher, judicial review of the network codes adopted through Commission Regulation is not enough to ensure full judicial accountability.<sup>72</sup> In these circumstances, the question is whether one can challenge in court the non-binding framework guidelines on which the non-binding network codes were based.

This question boils down to determining whether framework guidelines are justiciable and if they produce legal effects that could be recognized by a Court of law. Lavrijssen and Kohlbacher believe framework guidelines are not justiciable, and they make a strong case in this regard, discarding arguments pertaining to potential legitimate expectations of stakeholders.<sup>73</sup> Yet, based on financial regulation case law, we believe that one more point could be brought in favor of justiciability. As recently restated in *Clearing Houses*, the criteria used to determine the justiciability of an act are the wording, the context, the substance of the act, as well as the intention of its author.<sup>74</sup> In its analysis of the wording and context of the act, as observed by Türk, the Court gave more importance to the perception of the addressee than to the intention of the author.<sup>75</sup> Applying this same logic to the framework guidelines, it will be observed that their wording is quite prescriptive. For example, the Network Code Electricity Balancing ‘must be in line with the Framework Guidelines’ on the basis of which it was developed, ‘and also with the relevant EU legislation.’ Moreover, ‘the Agency will evaluate the Network Code on Electricity Balancing pursuant to Article 6(7) and (9) of the Electricity Regulation with regard to compliance with these Framework Guidelines and relevant EU energy legislation.’<sup>76</sup> This excerpt shows how EU legislation is placed at the same level from the point of view of the binding force as the framework guidelines themselves. Consequently, regarding the perception of the addressees as per *Clearing Houses*, the ENTSOs have no real choice but to comply with framework guidelines when elaborating the codes. What is more, the intention of the author appears to be that the Guidelines should

---

<sup>71</sup> Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00. *Artegoda GmbH and Others v Commission of the European Communities*. [2010] EU:T:2002:283, para 197.

<sup>72</sup> Lavrijssen and Kohlbacher, *supra* n 45, 62.

<sup>73</sup> *Ibid.*, 63.

<sup>74</sup> Case T-496/11, *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)*, [2015] EU:T:2015:133, para 31.

<sup>75</sup> A Türk “Liability and accountability for policies announced to the public and for press releases” in *ECB Legal Conference 2017 Shaping a new legal order for Europe: a tale of crises and opportunities* 45, available at <https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf?b452bb9c54dca55f8f5673b21631a4fem>, last accessed on 26<sup>th</sup> February 2018.

<sup>76</sup> ACER Framework Guidelines on Electricity Balancing, 5, available at [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Framework\\_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Electricity%20Balancing.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Framework_Guidelines/Framework%20Guidelines/Framework%20Guidelines%20on%20Electricity%20Balancing.pdf) consulted 27 February 2018.

produce binding effects. On this basis, a case might be made in favor of their justiciability (although standing requirements would have to be complied with too).

If in the case of framework guidelines justiciability could be established even though it does require a small leap in terms of legal thinking, in the case of the recommendations and opinions issued by ACER – either to the NRAs or to the TSOs – establishing justiciability would amount to an intellectual somersault without the safety net of legal arguments.

### 4.3 Recommendations to assist market players and regulators

According to Article 7 (2) of the Agency Regulation, ACER can make recommendations to assist regulatory authorities and market players in sharing good practices. As Article 288 (4) TFEU instruments, these are not legally binding, hence, in principle, not justiciable. There are several types of recommendations, according to the different legal basis provided for in secondary legislation.

#### 4.3.1 Recommendations and opinions on the work of the NRAs and EU institutions

##### A) Good practices

ACER provides a platform for cooperation for NRA, which, as expressly articulated under the legislation, should lead to the creation of a common regulatory regime to deal with cross border issues, such as managing the network, providing interconnection capacity, coordinating the development of network codes, and managing congestion.<sup>77</sup> In order to fulfill this cooperative rule, ACER has the power to make recommendations. ACER advises the NRAs in its areas of competence and can make recommendations to help share good practices.

One example is the ACER Recommendation 7/2013<sup>78</sup> regarding the cross-border cost request submitted in the framework of the first union list of electricity and gas projects of common interest. The Recommendation is part of the effort to build the internal energy market by setting up and developing energy infrastructure. Setting up such infrastructure involves important cross-border work, cooperative projects and large sums of money. Through its Trans-European Networks for energy strategy, the EU helps identifying priorities, individual projects, and financing them. The TEN-E Regulation sets the ground rules for this process, while encouraging cooperation between NRAs. Among others, the regulation provides for the cross-border allocation of costs (CBCA) for projects of common interest (PCI), in order to ensure that such projects get appropriate funding and that all Member States that benefit from such projects pay their share. Determining the CBCA is done, upon request of the project promoters, by the NRA of the MS where the project will have the most significant economic impacts. ACER's Recommendation 7/2013 is meant to 'assist the NRAs and promoters of PCIs in adopting a consistent EU-wide approach to CBCA requests.' It includes a series of technical

---

<sup>77</sup> Article 38 of the Electricity Directive, Article 42 of the Gas Directive.

<sup>78</sup> Recommendation of the Agency for the Cooperation of Energy Regulators No 07/2013 of 25<sup>th</sup> September 2013 regarding the cross border cost allocation requests submitted in the framework of the first Union list of electricity and gas projects of common interest, available at [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Recommendations/ACER%20Recommendation%2007-2013.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2007-2013.pdf), last checked on 26<sup>th</sup> February 2018.



specifications as to the information that is necessary to be submitted with a CBCA request as well as the principles that the NRAs should follow when handling such requests. The Recommendation invited the NRAs to take necessary measures to ensure that CBCA requests submitted by the project promoters are in line with the specifications of the recommendation.

Instruments addressed to national authorities designed to achieve a harmonisation of some elements of national practices (such as Recommendation 7/2013) are not legally binding for national authorities<sup>79</sup> and hence cannot be challenged or invoked by individuals in front of a court of law.<sup>80</sup> The NRAs might decide to comply with such recommendations only if they have an interest in doing so – and in this case, the recommendation will have a clear effect on third parties, the promoters of PCIs. Fresa argues that NRAs tend to agree to a CBCA compliant with Recommendation 7/2013 only if none of them is a net loser from the process.<sup>81</sup> While this might undermine consistency,<sup>82</sup> it is hard to build a court case against the NRAs claiming they did not observe the recommendation. At the same time, if brought to Court, recommendation 7/2013 would probably not be justiciable, and this even though sometimes it has important consequences with regards to allocating costs for projects of common interest in energy.

The immediate solutions to this lack of justiciability relate to situations when recommendations such as recommendation 7/2013 find their way into binding instruments, which can be relied on/ brought in front of the Court. This can happen in two ways. First, the Agency Regulation provides for ways to make such recommendations legally binding through Commission endorsement or ACER decisions. According to Article 7 (3), ACER can recommend the European Commission to adopt binding rules on the cooperation between national regulatory authorities. Such binding rules can in principle be the object of judicial review. Moreover, these recommendations might find their way into ACER decisions. For instance, in the example above regarding interconnection projects, the decision on the CBCA belongs to the beneficiary NRAs, and the intervention of ACER is required only if the NRAs concerned fail to reach an agreement on the investment request. This happened for the project regarding the Gas Interconnection between Poland and Lithuania. ACER noted in its decision<sup>83</sup> that the proposed CBCA deviated from its Recommendation 7/2013, and proceeded to set the cost allocation according to the latter instrument. Eventual claims against Recommendation 7/2013 can be made therefore in a potential action against the ACER decision.

---

<sup>79</sup> Case C-360/09 *Pfleiderer v. Bundeskartellamt* EU:C:2011:389, 21-22; Case C-23/14 *Post Danmark*, EU:C:2015:651 para 52.

<sup>80</sup> Commission recommendations were recently found not to be justiciable, despite the calls for a change in approach from the Advocate General (Case C-16/16 *Belgium v Commission* EU:C:2018:79).

<sup>81</sup> L Meeus and N Keyaerts, 'First series of cross-border cost allocation decisions for projects of common interest: main lessons learned' (2015), available at <http://fsr.eui.eu/Documents/PolicyBrief/Energy/2015/PB2015.01digital.pdf>.

<sup>82</sup> S Fresa, 'Multilevel EU Governance in Energy Infrastructure Development: A New Role for ACER?' (2015) 16, available online [http://www.diw.de/documents/dokumentenarchiv/17/diw\\_01.c.508434.de/fresa.pdf](http://www.diw.de/documents/dokumentenarchiv/17/diw_01.c.508434.de/fresa.pdf).

<sup>83</sup> 'Decision of the Agency for the Cooperation of Energy Regulators No 01/2014 of 11<sup>th</sup> August 2014 on the investment request including cross-border cost allocation for the gas interconnection Poland- Lithuania project of common interest No 8.5', published on ACER's official website and available at [https://www.acer.europa.eu/Official\\_documents/Acts\\_of\\_the\\_Agency/Individual%20decisions/ACER%20Individual%20Decision%2001-2014.pdf](https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Individual%20Decision%2001-2014.pdf), last checked on 26<sup>th</sup> February 2018.

## B) Compatibility of technical rules

Art 5 of the Electricity Directive provides that ACER may also make recommendations towards achieving compatibility of technical rules adopted by the Member States on safety criteria and on design and operational requirements with principles such as interoperability of the systems, objectivity and non-discrimination. ACER may make (not binding) recommendations towards achieving the compatibility of all these technical rules, thus having the potential to foster the development of consistent technical specifications throughout Europe. In principle, given their lack of legally binding force, these recommendations are not justiciable. However, they are giving expression to general principles of law, such as consistency<sup>84</sup> in the application of the energy legal framework in the EU. The argument is that, in the interest of consistency, national authorities should be bound by EU guidance, hence such instruments produce effects that make them reviewable by a Court of law. However, such points did not have, to date, much success in front of the ECJ, as recently confirmed in cases such *Expedia*.<sup>85</sup>

## C) Opinions on decisions taken by the NRAs

ACER also exercises oversight in relation to the compliance of decisions taken by the NRAs with the energy regulatory framework. According to Article 7 of the Agency Regulation, ACER can provide an opinion, based on matters of fact, at the request of a regulatory authority or the Commission, on whether a decision taken by a regulatory authority complies with the guidelines issued under or the provisions of the Electricity and Gas Regulations and Directives. ACER does not have the initiative of this compliance control – that can be undertaken solely upon request by an NRA or the Commission. Furthermore, ACER has no decision-making power in case of non-compliance, but can only voice its view on the conformity of a certain decision with the regulatory framework. In case the NRA disregards the opinion, ACER cannot impose any sanctions; it can only inform the Member State concerned and the Commission.

The opinions on compliance of NRA decisions are thus clearly not legally binding. Recent case law confirms that, therefore, neither are they justiciable. The Polish regulator requested an Article 7 opinion from ACER after NRAs from Central Europe failed to provide for a capacity allocation procedure on the German-Austrian border. Arguably, this failure resulted in significant power flows through the transmission grids in neighboring countries.<sup>86</sup> In its opinion, ACER agreed with the Polish regulator, and recommended the Central European NRAs to undertake a series of measures to ensure compliance with the Electricity Regulation. The Austrian regulator, E-Control, brought claims both in front of the General Court and in front of the ACER Board of Appeal. The General Court dismissed the action in an order,<sup>87</sup> and

---

<sup>84</sup> On consistency as general principle of EU law see E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' (2013) 15 *Cambridge Yearbook of European Legal Studies* 139-167.

<sup>85</sup> Case C-226/11, *Expedia Inc. v Autorité de la concurrence and others*, [2012] EU:C:2012:795.

<sup>86</sup> Traditionally, the territory of Austria, Germany, and Luxembourg represented one sole bidding zone for electricity. Recently, calls have been made for that zone to split, given the significant power flows through the transmission grids in neighbouring countries. (See also ACER Decision No 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' Proposal for the Determination of Capacity Calculation Regions currently challenged by E-Control in the pending case Case T-332/17).

<sup>87</sup> Order in Case T-671/15, *Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators*, [2016], EU:T:2016:626.

the ACER Board of Appeal also rejected E-Control's claim on the grounds that the contested opinion did not have binding legal effects.<sup>88</sup> E-Control followed up with judicial proceedings against the decision of the Board, but the General Court did not find, in its judgment, any error in law or infringement of rights of defense.<sup>89</sup> The *E-control* judgment and order confirmed that, in the absence of binding legal effects, the contested opinion could neither be reviewed by ACER's Board of Appeal, nor form the object of a claim for judicial review.

These cases are important not only for the discussion concerning the justiciability of non binding instruments issued by ACER, but for the wider academic debate on soft law, namely the taxonomy of soft law and of its legal effects. In order to establish justiciability of the ACER opinion, E-Control submitted two arguments related to the taxonomy of soft law: first, the opinion was a final document, not a preparatory one; second, that the opinion was an instrument that could be assimilated to Commission communications, often submitted to judicial review. With regards to the first argument, in its order, the Court agreed with the applicant, while noting that it does not review preparatory instruments (which can eventually be reviewed in actions against final decisions). Since ACER's opinion set out final legal assessments, it could not be a preparatory act, but neither was it a reviewable act under Art 263 TFEU as it did not set out any obligations for national regulatory authorities. The *E-control* order is important for the debate on the taxonomy of soft law as it constitutes a judicial acknowledgement of the category of preparatory instruments<sup>90</sup>. With regards to the applicant's second argument, the Court disagreed. It noted that, unlike the communications reviewed in the judgments cited by the applicant, ACER's opinion had a specific legal basis which provided for the adoption of non-binding instruments (art 7 (4) of the ACER Regulation). This indicates that there might be, after all, a distinction between soft law instruments mentioned in Article 288 TFEU (recommendations and opinions) and other instruments not mentioned by the Treaty (communications, notices, frameworks, etc.) Given their legal basis, the former may be considered *prima facie* as non-legally binding and not justiciable, while the latter are subject to closer scrutiny.

Affording such importance to the form, not to the content of the instrument in the legal analysis is surprising.<sup>91</sup> However, the order in *E-Control* does go into a discussion of the legal effects of the ACER opinion, by looking at the established criteria: wording and context, substance, and the intention of the author. The analysis is concerned less by the actual legal effects of the instrument at stake and more by determining whether the instrument is an opinion within Article 7 (4) of the Electricity Regulation. The Court outlines that Article 7 (4) opinions are only one among various other procedures envisaged to ensure the compliance

---

<sup>88</sup> Decision of ACER's Board of Appeal No A-001-2015 of 16<sup>th</sup> December 2015, available at [https://www.acer.europa.eu/en/The\\_agency/Organisation/Board\\_of\\_Appeal/Decisions/238%20A-001-2015%20BoA%20decision%20\(non%20confidential%20version\)%202112-2112.pdf](https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/238%20A-001-2015%20BoA%20decision%20(non%20confidential%20version)%202112-2112.pdf), last checked on 23<sup>rd</sup> February 2018.

<sup>89</sup> Case T-63/16 *Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators* [2016], EU:T:2017:456.

<sup>90</sup> M Eliantonio, 'Judicial Review in an Integrated Administration: the Case of 'Composite Procedures' (2015) 7(2) *Review Of European Administrative Law*, 65-102

<sup>91</sup> The mantra of the Court with regards to judicial review being that 'an action for annulment must [...] be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects' – cit. para 42 of case 22-70, *Commission of the European Communities v Council of the European Communities. European Agreement on Road Transport*. [1971], EU:C:1971:32

of NRAs decisions with the electricity market legislation, and that, given their legal basis, they are *supposed* to be not legally binding. This is by contrast to the binding decisions that ACER can issue in the limited cases provided for in Article 7 (1) of the Agency Regulation. It is the *Commission* who has the competence to issue decisions if the NRAs do not comply with the opinions issued by ACER under Article 7 (4). Therefore, binding effects are attached only to Commission decisions, and cannot ‘flow from the opinion adopted by ACER, even though that opinion may, in certain circumstances, be a prerequisite for the adoption of the Commission decision’<sup>92</sup> (and therefore have, in practice, important effects).

Following analysis, the Court held that the wording, the context, the substance of the contested opinion as well as ACER’s intention, all show that this was an Article 7(4) opinion, which meant it was not legally binding nor justiciable. Legal effects and justiciability become thus a function of the legal basis of the act. This can be contrasted with case law such as *Clearing Houses*, where the Court looks at the wording and context of non-legally binding instruments to determine whether the parties concerned could reasonably *have perceived* the act to be legally binding. No such analysis is present in the *E-Control* Order, and, what is more, the Court dismisses the argument according to which voluntary compliance with the ACER opinion of stake might be indicative of (perceived) binding effects and thus a potential trigger of justiciability.<sup>93</sup>

The order in *E-Control* shows once again that, notwithstanding the possibility that soft law has some legal relevance by providing ‘final legal assessments including legal requirements’,<sup>94</sup> instruments which do not set out, expressly, rights or obligations cannot be subject to judicial review. Striking the distinction between instruments providing legal assessments and instruments setting out rights and obligations is not straightforward. One may wonder whether, in the interest of judicial protection, a more profound scrutiny of the way in which the instrument might be perceived by interested parties should have been performed.<sup>95</sup> The opinions provided in Article 7 (4) of the Agency Regulation can be *de facto* binding for the NRAs, as they are issued under the shadow of potential infringement proceedings: Article 7 (5) provides that ACER should duly inform the Commission of non-compliance. Consequently, it might be expected that the Commission will follow up, potentially with infringement proceedings under Art 258 TFEU. What is more, evidence presented in *E-Control* showed that the disputed opinion was taken on board in subsequent documents from the ENTSOs, and endorsed by certain NRAs who expressed the will to voluntarily comply.<sup>96</sup> Despite all these legal consequences, both the Court and ACER’s Board of appeal refused to review the opinion on grounds of lack of binding legal effects.

Administrative and judicial review are thus situated at a remote end. Opinions such as the one at stake in *E-control* will not be reviewed by ACER’s Board of appeal even though they may produce important practical effects. More concretely, *E-control* is essentially a case about how bidding zones should be split in Europe, which would entail important consequences, for example on electricity market wholesale prices, impacting a wide range of stakeholders. Given

---

<sup>92</sup> Order in Case T-671/15 *E-Control*, *supra* n 87, 47

<sup>93</sup> *ibid*, 81-85.

<sup>94</sup> *ibid*, 64.

<sup>95</sup> The Court did not hesitate to do such an assessment in Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)* [2015], EU:T:2015:133.

<sup>96</sup> Order in Case T-671/15 *E-Control*, *supra* n 87, 77-79.

the lack of binding force, such opinions will not be the object of judicial review either. An oversight of Art 7 (4) opinions might be triggered only if NRAs refuse to comply with the provisions thereof. Only in cases of non-compliance the matter is brought to the attention of the Commission, according to Article 7 (5) of the Agency Regulation. The Commission will potentially review ACER's opinion before deciding to initiate further proceedings. And it is only if the Commission decides to follow up with infringement proceedings that ACER's opinion might end up on the desk of a judge. Would the Agency be granted the power to issue binding decisions in the cases envisaged by Art 7(4), defense rights could be easily ensured at a very early stage of the process, and would not depend on an additional assessment or review from the European Commission in order to be effective.

#### 4.3.2 Recommendations and opinions on the work of the ENTSOs

ACER has a monitoring role also in relation to the ENTSOs. It monitors the way in which binding or non-binding network codes are implemented by the ENTSOs. Furthermore, it oversees the adoption of common network operation tools,<sup>97</sup> of a non-binding EU-wide 10-year network development plan,<sup>98</sup> of recommendations on the cooperation with third countries,<sup>99</sup> of the ENTSOs annual work programme<sup>100</sup> and annual report,<sup>101</sup> as well as the annual summer and winter generation adequacy outlooks.<sup>102</sup> ACER is then accountable for this monitoring role to the Commission.

The procedure is as follows. First, the ENTSOs submit to ACER drafts, and second, ACER provides an opinion on these documents, checking in particular the conformity with principles such as non-discrimination, effective competition and the efficient and secure functioning of the internal markets in electricity and natural gas.<sup>103</sup> ACER needs to also report on this monitoring activities to the European Commission. ACER will then provide an opinion on all documents mentioned in Art 8(3) of the Electricity and Gas Regulations and their compliance with the above principles and the legislative framework. Moreover, ACER will provide a duly reasoned opinion and recommendations to the ENTSOs and the EU institutions when it considers that the annual work programme and the 10 year network development plan do not contribute to non-discrimination, effective competition or the efficient functioning of the market.

The Agency also double checks the compatibility of the Community wide network development plan with the 10 years national development plans, overseen by the NRAs.<sup>104</sup> In this regard, ACER can suggest amendments if it spots inconsistencies between these documents<sup>105</sup>. The legislative framework is silent as to where to submit such recommendations and no formal procedures are triggered by the discovery of inconsistencies.

---

<sup>97</sup> Article 8(3)(a) of the Electricity and Gas Regulations.

<sup>98</sup> Article 8(3)(b) of the Electricity and Gas Regulations.

<sup>99</sup> Article 8(3)(c) of the Electricity and Gas Regulations.

<sup>100</sup> Article 8(3)(d) of the Electricity and Gas Regulations.

<sup>101</sup> Article 8(3)(e) of the Electricity and Gas Regulations.

<sup>102</sup> Article 8(3)(f) of the Electricity and Gas Regulations.

<sup>103</sup> Article 9(1) of the Electricity and Gas Regulations.

<sup>104</sup> Provided for in Article 22 of the Electricity and Gas Directives.

<sup>105</sup> Article 8(11) of the Electricity and Gas Regulations.

However, as interpreted by Ermacora, ACER could potentially address these recommendations to the Commission, Council and the EP as well.<sup>106</sup>

It is interesting to note that these opinions and recommendations shall be based on ‘matters of fact’, in accordance to Art 9.2 of the Electricity and Gas Regulations. The Council proposed this formulation during the second reading, as a result of the opposition by some Member States to task ACER with legal assessments and compliance checks.<sup>107</sup> As Ermacora points out, such distinction is without practical relevance, given that legal assessments are generally based on matters of fact. However, this opposition might reflect the lack of political will to grant the Agency some say in legal matters, and consequently subject its acts to judicial review. It remains to be seen whether the Court would decide to exercise review over this type of instruments. The argument that is made generally against the justiciability of soft law addressed to regulatory authorities is that such instruments do not create rights or obligations for the individuals.<sup>108</sup> However, these recommendations are directly addressed to the TSOs, making suggestions as to whether the documents that they drafted are in line with the energy legislative framework. A case can thus be made potentially in favor of justiciability, if TSOs manage to prove that their rights and obligations might be affected by such recommendations.

#### 4.4 REMIT Soft Law

As mentioned in Section 3, ACER is involved in the implementation of the REMIT Regulation, which deals with monitoring market integrity and transparency, in order to detect eventual market manipulation. Among others, ACER has set up an online portal on the REMIT information system (ARIS), which will enable market participants to report transactions as provided for in the Regulation and implementing acts. NRAs undertake monitoring at the national level, and REMIT provides for close cooperation between them and ACER in order to ensure proper monitoring and transparency of energy markets. While the NRAs have specific investigation and enforcement duties under REMIT, ACER acts as a coordinator of these tasks. REMIT also creates links with other agencies, as it imposes obligations to inform European Securities and Market Authority (ESMA) wherever there is suspicion that market abuse might affect financial instruments.

More interestingly for this paper, ACER can publish non-binding guidance on the definitions set out in the REMIT Regulation,<sup>109</sup> which should address, inter alia, the issue of accepted market practices.<sup>110</sup> Such guidance belongs to the category of interpretative soft law<sup>111</sup> is directed to NRAs in order to ensure coordination and consistency in their monitoring activities under the Regulation. The Agency published so far four editions of this guidance, starting in

---

<sup>106</sup> F Ermacora, *supra* n 28, 269.

<sup>107</sup> *ibid*, 268 at FN 271.

<sup>108</sup> Case C-226/11, *Expedia supra* n 85, Case C – 410/09 *Polska Telefonia Cyfrowa sp. z o.o. contro Prezes Urzędu Komunikacji Elektronicznej*, [2011], EU:C:2011:294.

<sup>109</sup> Article 16 of the REMIT Regulation.

<sup>110</sup> See Recital 27 of the REMIT Regulation.

<sup>111</sup> L Senden, *supra* n 60, 140.

2011, with the most recent update dating back to June 2016.<sup>112</sup> It has been observed that ACER adopted guidance in all areas of REMIT, and not only in the areas defined in Article 16(1) of the REMIT Regulation.<sup>113</sup> With regards to legal effects, as mentioned on the site of ACER as well as in an 'important notice' at the start of the Guidance, it is 'deliberately drafted using non-legal terminology and does not provide an interpretation of REMIT. It is made public for transparency purposes only.' Given all these disclaimers, the Guidance seems to be a particularly weak form of soft law, if it is soft law at all, because it is expressly meant not to have legal value, nor to interpret REMIT.

While practical effects of REMIT guidance can be important, can influence decisions by administrations or even courts in individual cases,<sup>114</sup> soft law issued in this context might also escape judicial review. In the absence of specific case law, if one looks at corresponding soft law in the competition area, it might be argued that instruments issued to foster the respect of general principles of law, such as transparency - might have certain legal effects. Indeed, it has been often pointed out that soft law plays an important role in creating links between the institutions and individuals, natural or legal persons, thus enhancing legal certainty and transparency of administrative activity. Through these instruments, institutions explain the existing law in a specific sector, present their views on the law and clarify those provisions of an open and indeterminate character.<sup>115</sup> In this context, Snyder talked about 'regulation by publication'<sup>116</sup> and Hoffman about 'regulation by information'.<sup>117</sup> Thus, soft law is meant to help the individuals to understand what the law is, what the boundaries of their actions should be and what they should expect in case of infractions. Furthermore, soft law can help national authorities understand and implement EU law, thus connecting the EU and the national levels of governance and creating the premises for a uniform and consistent application of European hard law.

All these considerations were taken into account in the competition case law. The Courts constructed a mechanism based on general principles of law in order to recognize the legal effects of soft law instruments. As laid down in cases such *Dansk Rørindustri*, by publishing soft law, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under risk of being found to be in breach of the general principles of law such as equal treatment or the protection of legitimate expectations.<sup>118</sup> However, it is difficult to apply this line of case law to REMIT soft law. First, even in competition, the Court was not ready to extend this case law to recognize binding effects of guidance for national regulatory

---

<sup>112</sup> The official document of the mentioned guidelines is available on ACER's website, at [http://www.acer.europa.eu/Official\\_documents/Other%20documents/4th%20Edition%20ACER%20Guidance%20REMIT.pdf](http://www.acer.europa.eu/Official_documents/Other%20documents/4th%20Edition%20ACER%20Guidance%20REMIT.pdf), (last checked: 26<sup>th</sup> February 2018).

<sup>113</sup> J Godin *et al*, *supra* n. 54, 203.

<sup>114</sup> *Ibid* 205.

<sup>115</sup> M Gardenes Santiago, 'Las comunicaciones interpretativas de la Comision: concepto y valor normativo' (1992) 19 *Revista de Instituciones Europeas* 933, 939-940; B Bertrand, 'Rapport introductif: les enjeux de la soft law dans l'Union Européenne', (2014) 575 *Revue Trimestrielle de l'Union Européenne* 73, 80.

<sup>116</sup> F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer Law International, 1994) 199-201.

<sup>117</sup> H Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy' (2006) 43 *Common Market Law Review* 153, 169-170.

<sup>118</sup> Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] EU:C:2005:408, 211.



authorities.<sup>119</sup> Second, unlike the European Commission, ACER does not have the competence to issue binding decisions. ACER can conduct market investigations on wholesale energy markets involving several MS where abuse of dominance contrary to the competition rules is suspected. Specifically, where it suspects that REMIT has been breached, ACER may ask NRAs to supply information, to commence investigations, to take appropriate actions to remedy the breach, and set up and coordinate investigatory groups in case there is suspicion of cross-border impact. The responsibility for binding legal action however lies with the NRAs and not ACER. It is difficult, therefore, to export the competition case law recognizing effects to soft law through the operation of principles of law to REMIT soft law issued by ACER, even if these too are interpretative instruments aimed at increasing transparency.

## Conclusion

Following a strict application of the *Meroni* doctrine, ACER was granted limited powers and issues mainly non legally binding material (or soft law). As seen above, in the absence of binding effects, most of these instruments are neither justiciable, nor reviewable by the ACER Board of Appeal. This raises problems with regards to important principles laid down in *Meroni*: accountability and institutional balance. Such problems are of particular salience given the context of the complicated system of delegation and re-delegation of power in energy, coupled with the fuzzy boundaries of shared competences. Furthermore, the current system has important deficiencies, from a consistency and clarity point of view, which increases the need for judicial review.

Several solutions can be envisaged to settle this conundrum. For example, more powers could be granted to ACER to issue legally binding material, going beyond the cosmetic upgrade done by the Winter Package. However, such solution is politically impossible,<sup>120</sup> and runs counter the tenet that only non-discretionary powers can be granted to the Agency, provided that the applicability perimeter related to the changes inferred from *Short Selling* is debatable. Another solution would be for the Courts and (or at least) the Board of Regulators to have a nuanced approach to assessing legal effects, and review instruments that are, *de facto*, binding such as the contested opinion in *E-control*. However, this might be considered a stretch with regards to the range of reviewable acts provided for by the Treaty, in which case one could advocate for a more prominent role of the national courts in ensuring control and judicial protection. As argued by Türk,<sup>121</sup> the preliminary reference procedure and/or the pleas in illegality under Article 277 TFEU might provide a solution absent the conditions for direct actions against certain soft law instruments. The argument is that the wording of what constitutes a reviewable act is wider under Articles 267 and 277 TFEU than under Article 263 TFEU. Thus, while the effects of non-legally binding instruments are too weak to be caught by direct actions, they are strong enough to trigger judicial review in preliminary rulings or pleas of illegality.

---

<sup>119</sup> Case C - 526/14, *Tadej Kotnik and Others v Državni zbor Republike Slovenije* [2016] EU:C:2016:570 and Case C-226/11, *Expedia supra* n 85.

<sup>120</sup> "Proposal for a Governance Regulation", Explanatory Memorandum, 2 - 11.

<sup>121</sup> A Türk, *supra* n 75, 52-55.

However, judicial review is hardly a panacea for modern ills of regulation, and one may wonder whether Courts are the most appropriate fora to settle matters in such interdisciplinary sectors as energy. It must be recalled that most of the documents issued by ACER, with or without the cooperation of the NRAs or the TSOs, are very technical in nature. Law might very well reach its limits when stepping on the ground of engineers, with judicial review confined to existing boundaries of expertise. Furthermore, the procedural requirements against which Courts might check these instruments are not always clearly outlined in the legislation – as is the case with most EU agencies.<sup>122</sup> Ironically perhaps the ACER Rules of Procedure are not legally binding – hence all soft law drawbacks concerning will apply.<sup>123</sup> In the current regulatory framework, it appears that the heavy burden of control rests with the European Commission, who can have the last say on matters ranging from network codes to the application of ACER opinions.

---

<sup>122</sup> M. Chamon, 'EU Risk Regulators and EU Procedural Law' (2014) *European Journal of Risk Regulation*, 5(3), 324-337

<sup>123</sup> Lavrijssen and Kohlbacher, *supra* n 45, 64.